UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -X
UNITED STATES OF AMERICA,

Plaintiff,

- against-

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al.,

Defendants.
- -X

Civil Action No.
CV-05- 3212

(Glasser, J.)
(Pohorelsky, M.J.)

PLAINTIFF THE UNITED STATES OF AMERICA'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR A PROTECTIVE ORDER PURSUANT TO RULE 26(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE

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PRELIMINARY STATEMENT

The United States of America respectfully submits this reply memorandum of law in further support of its motion for a protective order, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, holding that the documents generated by the U.S. Department of Labor, Employee Benefits Security Administration ("EBSA") in connection with an audit of the Defendant METRO-ILA Funds (collectively "METRO" or the "METRO-Defendants") are privileged and not subject to disclosure. [1] METRO's opposition to the motion remarkably ignores key facts and the sworn statements previously submitted by the United States. While the METRO Defendants contend that the United States has made overly broad assertions of privilege, METRO's own challenge is sweeping, and it refuses to acknowledge privilege with respect to *any* documents. Ultimately, METRO implicitly concedes that it has no need of the EBSA documents, laying bare the inescapable conclusion that METRO's purpose in insisting upon production of the documents is to improperly delve into the minds of the EBSA investigators and Assistant U.S. Attorneys assigned to this case.

To emphasize the strength of the United States' claims of privilege, the United States will produce, with the courtesy copy of this memorandum, copies of certain of the withheld documents for *in camera* review. The United States respectfully submits that this sampling of documents responds to many of the issues raised by METRO, responses which the United States simply cannot make in a public filing. For example, the United States is producing for *in camera* review four pages of the investigators' notes regarding their review of documents. Likewise, the United States is producing herewith copies of the Memos to the Associate Regional Director and the Director of Enforcement, both dated July 1, 2005

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[1] The United States also hereby requests leave to exceed the Court's page limit for reply memoranda of law.

(Privilege Log at p. 4) and an August 2003 email from EBSA Investigator Courtney Derwinski to the USAO (Privilege Log at p. 5). These documents plainly reflect facts that the investigators thought important for their review, notes that the investigators made to themselves about potential issues, lines of inquiry, and documents to request. They likewise reflect the initiation of EBSA's audit, issues that EBSA perceived and that had yet to be resolved, its perception of its role in the USAO's investigation, and communications with the USAO, thereby shedding light on the Privilege Log as a whole.

ARGUMENT

I. THE PRIVILEGE LOG ADEQUATELY DESCRIBES THE DOCUMENTS SOUGHT TO BE WITHHELD.

METRO attacks the sufficiency of the United States' Privilege Log, arguing that the log "fails to provide a specific description of *each of the documents*" at issue.[2] Nominal Defendants MMMCA and the METRO-ILA Funds' Memorandum of Law in Opposition to the Government's Motion for a Protective Order ("METRO Memo") at pp. 1-2 (emphasis added). Notably, METRO conducts no analysis of the documents; it merely levels its accusations at every entry without any consideration of the specifics. In point of fact, each entry on the United States' Privilege Log describes the document, lists the author, and identifies the date of its creation (if applicable). See Fed. R. Civ. P. 26(b)(5)(A).

For example, the first entry in the log, "Report of Interview of Edward O'Connor," identifies Robert Goldberg and Robert Schildkraut as its authors and March 3, 2004 as the date of its preparation. What additional information does METRO demand if not the content of that report, the very matter at the heart of the asserted privilege and whose disclosure would vitiate the assertion? The utter lack of merit in METRO's argument is revealed by the simple fact that METRO knows full well what happened at that interview, and it does not need the document or a fuller description of it to garner that information. Indeed, METRO's counsel was present at every interview of a METRO employee. Thus, the only purpose in demanding this document is to delve into the investigators' minds and determine what information they and the U.S. Attorney's Office (the "USAO") thought was important.

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[2] The United States' Privilege Log is attached as Exhibit 1 to the Declaration of Kathleen Nandan, dated July 20, 2007 ("Nandan Decl.").

METRO's fishing expedition does not stop there. It demands the memoranda prepared by the investigators to their superiors regarding the progress of the audit (Privilege Log at p. 4)[3] and memoranda documenting meetings with AUSAs (Privilege Log at p. 5). Again, METRO fails to identify what additional information it requires to evaluate the assertions of privilege. METRO also demands the investigators' notes of documents reviewed and, tellingly, notes of potential lines of inquiry at interviews (Privilege Log at p. 4), incredulously stating that "one cannot discern the reasons those documents [audit work papers, notes, charts, and graphs prepared by the EBSA investigators] were prepared." METRO Memo at pp. 23-24. The very essence of these documents, ascertainable by their description alone, implicates the asserted privileges. In short, METRO fails to articulate why the information provided in the Privilege Log with respect to any particular document is insufficient to enable METRO to assess the claims of privilege.

[3] These memoranda are the July 1 memoranda submitted for *in camera* review.

II. THE EBSA DOCUMENTS ARE PRIVILEGED WORK PRODUCT

The METRO Defendants argue that the EBSA documents were not created "in anticipation of litigation" and therefore do not constitute privileged work product. METRO's logic is tortured and results in a double standard wholly unsupported by the case law. Further, METRO sidesteps the second prong of the privilege analysis, i.e., whether it has substantial need for the documents. The Court should therefore reject its arguments.

A. The Documents Were Created in Anticipation of Litigation

METRO essentially concedes that it anticipated litigation when faced with the EBSA audit. See METRO Memo at p.16. Indeed, "[r]egulatory investigations by outside agencies present more than a mere possibility of future litigation, and provide reasonable grounds for anticipating litigation. Garrett v. Metropolitan Life Insurance Co., No. 95CIV2406 (PKL), 1996 WL 325725, *3 (S.D.N.Y. June 12, 1996) (citing Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252, 1261 (3d Cir. 1993) (OSHA inquiry sufficient to anticipate litigation) and Martin v. Monfort, Inc., 150 F.R.D. 172, 173 (D. Colo. 1993) (Department of Labor investigation provides reasonable grounds to anticipate litigation)). This conceded fact utterly undermines METRO's demand for the United States' work product, forcing METRO to propose that the Court create a double standard whereby the reciprocal nature of discovery under the federal rules would be ignored.

METRO argues that the "in anticipation of litigation" element of the work product privilege hinges not upon *its* expectation, but solely upon EBSA's expectation, and crucially, upon the assumption that EBSA did not contemplate litigation. METRO Memo at pp. 11-12. Citing EBSA's enforcement manual for the general proposition that EBSA typically aims for voluntary resolution of matters, METRO blithely asserts that "it is unlikely that litigation was ever contemplated by EBSA." METRO Memo at 12.[4] Of course, METRO cannot, and indeed does not, cite to anything other than this irrelevant general policy, and it avoids the specific facts in *this* case. Thus, METRO ignores the fact that the EBSA investigation followed on the heels of several high profile prosecutions (and convictions) of mobsters affiliated with METRO, including Genovese family soldiers Pasquale Falcetti and Michael Ragusa (both high-ranking employees of the METRO Funds) and Gambino family member Jerome Brancato (the father of METRO employee Jerome Brancato). See Plaintiff the United States of America's Memorandum of Law in Support of its Motion for a Protective Order Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure ("Opening Brief") at pp. 2-3. The prospect of litigation was thus palpable and public.[5] Clearly METRO knew that there was "more than a remote possibility of litigation," yet it urges this Court to find that there was not. See Pacamor Bearings, Inc. v. Mineba Co., Ltd., 918 F.Supp. 491, 512 (D.N.H. 1996) (citation omitted).

For this reason, the METRO Defendants' reliance upon Martin v. Valley National Bank, 140 F.R.D. 291 (S.D.N.Y. 1991), is misplaced. There, the Court found that the Department of Labor began an ordinary review and that litigation was not anticipated, at least at the point at which certain of the documents in question were created.[6] Rather, the facts of this case are more analogous to those in Herman v. Crescent Publishing Group, Inc., 00 Civ. 1665, 2000 WL 1371311 (S.D.N.Y. Sept. 21, 2000). In that case, the Department of Labor began investigating the defendant pursuant to its regulatory authority under the Occupational Safety and Health Act of 1970 ("OSHA") after the discovery of facts tending to show that the defendant may have discharged an employee in violation of OSHA. Id. at *1. Even though the government had broad regulatory authority to commence an OSHA investigation, the court found that the documents at issue were nevertheless created in anticipation of litigation. Specifically, the court upheld the Secretary of Labor's assertions of privilege with respect to investigator reports, handwritten notes, and file memoranda, observing that "it is obvious that the DOL investigator was not engaged in a random audit to determine if he could unearth some wrongdoing." Id. at *4. See also Martin v. Albany Business Journal, Inc., 780 F.Supp. 927, 942 (S.D.N.Y. 1992) (documents created by DOL during "random investigation" would not be entitled to work product protection, but documents created "during an investigation that was conducted pursuant to a specific claim of impropriety" would be). Given the context in this case, which included a flurry of criminal prosecutions and convictions in which METRO employees were implicated, METRO is hard pressed to contend that this was some "random" audit.[7]

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[4] METRO's criticism that the United States has not demonstrated that the EBSA documents "relate in any way to the allegations in the Amended Complaint" as further basis for its opposition to the motion is truly remarkable. METRO Memo at p. 13. The United States' claim of privilege need not be premised upon what the United States ultimately alleged in its Complaint. Not surprisingly then, METRO cites nothing to suggest that a document prepared in anticipation of litigation must necessarily be incorporated into pleadings later filed with the Court. Rather, as the cases cited by METRO itself make clear, "[t]he work product privilege protects documents prepared in anticipation of litigation regardless of whether the anticipated litigation ever occurs." In re Sealed Case, 146 F. 3d 881, 888 (D.C. Cir. 1998).

[5] Indeed, The New York Times published articles regarding a possible civil RICO action.

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[6] METRO misses the point by insisting that work product does not attach to documents created pursuant to a random investigation (i.e., documents created in the ordinary course of business). Whatever the abstract merit of this view, it has no application here, where the investigation was decidedly not random, and it was clear to all, including METRO, whose counsel participated in the process, that litigation was anticipated.

[7] The Albany Business Journal court ordered an evidentiary hearing to resolve the issue of what prompted the investigation. As set forth above, the United States considers such information privileged but suggests that the documents submitted for *in camera* review provide sufficient information for the Court to determine what factors played into EBSA's decision to initiate the audit.

Ultimately, METRO embraces the fact that litigation was expected, but urges the Court to suspend disbelief and find that only METRO's documents constitute work product, a stance which is duplicitous in the extreme. This is confirmed by the fact that METRO cites no authority for the proposition that documents created by one party to a litigation may constitute work product, while documents created *at the same time and in the same context*, by the opposing party do not. In plain English, METRO cannot be allowed to have it both ways. Either the EBSA audit was routine, and both the United States' and METRO's documents are not privileged, or the audit was, as both sides appear to argue, conducted in anticipation of litigation. To the extent that documents generated by EBSA must be disclosed, the same must hold true for any notes or other documents or recordings prepared by the METRO Defendants.

The METRO Defendants thus fall back to the assertion that the EBSA documents cannot constitute work product because it would have been inappropriate for EBSA, which was conducting an audit of the METRO Funds pursuant to its independent authority, to have relayed its findings or information gathered to the U.S. Attorney's Office.[8] This argument is contradicted by the METRO Defendants's own submissions. Specifically, Exhibit I to METRO's April 23rd Letter (Docket No. 230), an excerpt from a website offering guidance to EBSA investigators, instructs investigators and auditors to advise interviewees that *any* information bearing upon a possible violation of law (not just violations of ERISA) "will [be] refer[red] to the U.S. Department of Justice or other appropriate agency." Exhibit I, page 5, ¶

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[8] EBSA Supervisory Investigator Robert Goldberg has no recollection of the exchange related in the Corcoran Decl., which, notably, appears to be based upon hearsay. Declaration of Robert Goldberg, dated November 9, 2007.

15a.[9] Clearly, the METRO Defendants do not mean to suggest that one governmental agency cannot communicate its findings to another, a suggestion plainly refuted by the record in this case. See, e.g., Campbell Decl. at ¶5 ("EBSA investigators at times *must* communicate, correspond, and share information . . . with other law enforcement personnel) (emphasis added). Moreover, unlike each and every one of the cases cited by the METRO Defendants in their April 23rd Letter at n. 6 (incorporated into the METRO Memo at p. 15), here, there is no allegation that the EBSA audit was used as a front to conceal an ongoing criminal investigation. Indeed, the instant case is a *civil* RICO action in which the METRO Defendants were named as nominal defendants and those interviewed by EBSA are not named as parties at all. In conclusion, the EBSA documents were created in anticipation of litigation and are protected from disclosure by the work product privilege. METRO's arguments to the contrary are without merit.

B. The METRO Defendants Cannot Establish Their Need for the Documents

It comes as no surprise that METRO discusses its alleged need for the EBSA documents in a footnote. METRO Memo at p. 25 n. 14. This is because METRO's position is simply untenable, and its own motion papers are internally inconsistent on this point. METRO swings between its bold conclusion that the EBSA documents are "highly relevant," METRO Memo at p. 25 n.14, and its argument that the Privilege Log is so vague that it cannot determine what the content of the documents might be, METRO Memo at pp. 1-2. The fact is that

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[9] The METRO Defendants appear to have abandoned their argument, advanced in this April 23rd letter, that any reports of interview constitute "statements" under Rule 26 of the Federal Rules of Civil Procedure. To the extent that they continue to press this point, for the reasons set forth in the United States' May 8, 2007 letter (Docket No. 242), that argument is without merit.

METRO has no need, let alone a substantial need, for the documents in question. See Opening Brief at pp. 9-10.

Perhaps in an effort to confuse the issues, METRO conflates the requirement that it demonstrate a substantial need for the EBSA documents with its claim that any documents that it may have, unlike EBSA's documents, need not be produced. In essence, METRO argues that the United States never requested such documents from it and that, as such, the Court need not address this issue. As set forth in the Opening Brief at pp. 9-10, this is simply inaccurate.[10] Regardless, whether there is any outstanding request for METRO to produce its audit related documents or not, METRO nevertheless must establish its need for EBSA's documents if it hopes to overcome the privilege assertions. METRO's steadfast refusal to even answer the simple question of whether it has such documents leads to only one conclusion: such documents exist and they are in METRO's possession.[11]

III. THE DELIBERATIVE PROCESS AND LAW ENFORCEMENT PRIVILEGES WERE PROPERLY INVOKED.

As with questions of work product, METRO broadly maintains that the law enforcement and deliberative process privileges do not attach to any of the documents logged by the United States, arguing that "[n]ot a single interest of the law enforcement privilege would be implicated by disclosure [and] none of the materials are predecisional [or] deliberative . . . ." METRO Memo at p. 5. This position reflects METRO's fundamental misunderstanding of both the law enforcement and deliberative process privileges, which as set forth in the Opening Brief at pp. 11-14, are related concepts.

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[10] Further, the United States specifically inquired into the existence of tape recordings and notes at a meeting at its offices. See Nandan Decl., Exhibit 3 (letter from METRO counsel in response to request by United States stating that counsel had not promised to inquire into existence of such items).

[11] Indeed, the Corcoran Decl. is notable for its silence on this matter.

First, METRO appears to argue that, because EBSA has published guidance on the internet regarding certain aspects of the conduct of its investigations, no privilege can attach to EBSA's documents. This position is unfounded and, again, contradicted by the METRO Defendants' own submissions. As Exhibit I to the April 23rd Letter makes plain, "EBSA investigations are not public." Exhibit I, page 6, ¶ 16. Further, the fact that certain of the forms used by EBSA may be publicly available does not translate into a waiver of any applicable privilege with respect to the contents of a completed form. While the general contours of investigation protocol are not privileged and are publicly available, the specific details of a particular, the considerations underlying that investigation, and any evaluations or recommendations that may be made during the course of that investigation certainly are privileged.

METRO further complains that neither the Campbell nor Goldberg Declarations state that EBSA's audit "was conducted at the request of the USAO or that investigators sought the counsel of any Assistant United States Attorney." METRO Memo at p. 9, n.7. METRO, however, fails to acknowledge that *why* an investigation is opened strikes at the very heart of the law enforcement privilege and that the United States cannot respond to that demand without violating the privilege that this motion is designed to protect. See, e.g. Opening Brief at pp. 11-13.

METRO's next bold statement, that none of the EBSA documents are predecisional, is puzzling. Both the Campbell and Goldberg Declarations make quite clear that EBSA's audit has not yet been completed. Campbell Decl. at ¶¶ 6, 9 and Goldberg Decl. at ¶ 3. METRO counters with the Corcoran Decl.'s bland assertion that only a "small number of additional documents" remain outstanding, implying that the audit is, for all intents and purposes, finished. Corcoran Decl. at ¶ 8. METRO's unsupported conjecture is entitled to little weight, and, notably, its characterization of the status of the audit is soundly contradicted by the Goldberg Decl., which states that "numerous boxes of documents have neither been delivered to EBSA nor reviewed by EBSA personnel." Goldberg Decl. at ¶ 3. Unless METRO was producing largely empty boxes, thousands of pages remain to be reviewed.[12]

In a futile attempt to justify its continued characterization of the audit as essentially complete, METRO disputes why EBSA suspended its review. This argument is largely irrelevant to the matters before the Court. No matter how METRO may choose to characterize the relevant events, once this action was filed and METRO unambiguously stated that it did not want EBSA to communicate with the attorneys for opposing counsel (the USAO), the audit was suspended. METRO's position that it cannot "'request' suspension of an EBSA review" plays too cute. METRO Memo at p. 7 n. 5. EBSA has always made plain that it may communicate with other governmental agencies, including the USAO. See supra at pp. 8-9. METRO's plaintive demand that EBSA finish its review but not communicate with the USAO ignores the facts of this case and EBSA's own policies. In short, why EBSA did not complete its review is of no moment. The fact remains that the review is not complete, and the EBSA documents are necessarily pre-decisional.

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[12] The United States also respectfully refers the Court to the July 1, 2005 memoranda submitted herewith for the Court's *in camera* review. Because EBSA suspended the audit in the summer of 2005, at or about the same time that these memos were prepared, the Court can evaluate for itself whether and to what extent METRO's characterization of the audit's status is accurate.

IV. METRO'S CHALLENGE TO THE ATTORNEY CLIENT PRIVILEGE IS WITHOUT MERIT

As set forth in it previous submissions, the United States believes that this dispute can be resolved on the basis of the work product and deliberative process privileges. Nevertheless, it maintains that, as the EBSA documents reflect ongoing communications between the USAO and EBSA, they are privileged attorney client material. Although the United States will not repeat its arguments made in its Opening Brief, it does want to take this opportunity to briefly respond to one particular point made in METRO's opposition.

The METRO Defendants argue that any communications in which EBSA did not seek legal advice, but rather shared investigative findings and relevant documents cannot be characterized as attorney-client communications. Regardless of the merit of that argument, such communications are privileged work product (if not attorney-client) in that they reflect the USAO's considered request for information and specific documentation that was and is generally available to the METRO Defendants. See METRO Memo at p. 8 n. 6 (conceding that the United States has produced documents produced to the Department of Labor pursuant to third party subpoenas during an OIG investigation). The privilege asserted in this context is analogous to the "selection and compilation" privilege set forth in Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985), cert. denied, 474 U.S. 903 (1985), and Shelton v. American Motors Corp., 805 F.2d 1323, 1329 (8th Cir. 1986). In those cases, the work product privilege was upheld: while the underlying documents were discoverable, the opposing party was not entitled to information regarding the attorney's review and analysis of those documents because it would reveal the attorney's mental impressions and thought processes. See also In re Grand Jury Subpoenas, 318 F.3d 379 (2d Cir. 2003) (recognizing selection and compilation exception but declining to uphold assertion of privilege where, inter alia, requesting party did not already possess relevant documents).

METRO's mighty struggle to obtain documents reflecting information already in its possession is nothing more than a thinly veiled attempt to obtain insight into the United States' litigation strategy. Indeed, as one court has noted, "[W]hen the information being sought is available from sources less entangled in privilege issues, a founded suspicion may arise that the seeking party is in fact attempting to exploit attorney work product." United States v. District Council of New York City, No. 90 CIV 5722 (CSH),1992 WL 208284 at *12 (S.D.N.Y. Aug. 18, 1992). That founded suspicion is warranted here, and the United States' motion for a protective order should be granted.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court enter a protective order regarding the EBSA documents, together with such other and further relief as to this Court seems proper.

Dated: Brooklyn, New York
November 9, 2007

Respectfully submitted,

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